No. 138

In the

Supreme Court of the United States

October Term, 1952

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

VS.

HALL C. SMITH,
Respondent.

BRIEF OF RESPONDENT, HALL C. SMITH

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CASES CITED

AUTHORITIES CITED

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STATEMENT OF FACTS

The taxpayer was president and sole owner of the capital stock of the Charles E. Smith ~~& Sons, Co.~~, a corporation under the laws of Ohio. As president, he was paid a salary for the year 1943 of $87,265.00. The salary was determined to be excessive for income tax purposes to the extent of $57,265.08. As a result of said determination the excessive portion was not allowed as a deduction to the corporation thus resulting in an increase in the corporation's income tax and excess profit tax. The amount of the assessment exceeded all the assets of the corporation at the end of its 1943 fiscal year by some $34,000.00; and by reason of loss sustained by the corporation in the year 1944, the tax

assessments now exceed the corporation's assets by about $80,000.00. The Commissioner asserted a transferee tax liability against the taxpayer for the portion of the salary which was determined to be excessive, and upon which he had theretofore paid income tax.

In the year in question the corporation withheld part of taxpayer's salary to apply on his income tax and remitted the same to the Collector. The taxpayer filed Estimated Tax Returns and prepaid tax on a portion of his salary. At the end of the taxable year he filed tax returns and paid the balance of the taxes.

The claim for refund attached to the petition set forth that during the year 1943 taxpayer paid through, Withholding, Declaration of Estimated tax, and with tax return, a total of $59,488.25. If only the salary that he should have received, that is $30,000.00 for the year 1943 was included in his Tax Return, the total income tax due thereon would have been $12,624.25. The taxpayer therefore contends that he overpaid the amount of $46,864.00.

The undisputed facts disclose that in the year 1943 out of $87,000.00 which he was supposed to receive as his salary he had the economic use of only $28,000.00 and the balance of $59,000.00 went directly to the government in the form of withholding taxes which never reached him, Declaration of Estimated Taxes which he prepaid during the year, and the balance of the taxes paid within several months of the end of the year. While he (R. 29, paragraph 7) received a salary of $87,000.00 under claim of right and has reported said amount of salary, however (Paragraph 6, R. 29), *he made payments through Withholding, Declaration of Estimated Tax, and at time of filing of return of $59,000. Thus the amount that he ever received or held under claim of right and had the economic use of, is only $28,000.*

Those are the admitted facts and it is in line with those facts that the court must consider the present case.

ARGUMENT

Where an individual receives compensation from a corporation, amounting to $87,000.00 per annum, and by withholding pre-payment and income taxes pays thereon $59,000.00, and retains $28,000.00 for his own use; and where the Government asserts a liability as transferee against said individual, for an amount of $57,000.00 of the $87,000.00 by reason of the fact that only $30,00.00 is held to be reasonable salary, and that the excess of $57,000.-00 was impressed with a trust in favor of the Government. Quaere: May the individual receive a refund of the tax paid on the income impressed with a trust in favor of the government and which he must return to the Government, or a credit on the transferee liability?

Answer: The Tax Court held "yes". The Court of Appeals held "yes".

The taxpayer contends that the answer should be "yes".

We direct the Court's attention to *The Law of Federal Income Taxation, Mertens, Vol. 2, page 594, Section 17.08*:

> "Where the taxpayer receives payment which cannot be legally devoted to his own uses but under the terms of a trust, express or implied, must be devoted to the benefit of some other person or to some particular purpose not relating to the interest of the taxpayer, it is necessarily held that the taxpayer does not receive income of a character which should be taxed to him personally. It is the beneficial owner who is subject to the tax. The restrictions on the use of the receipts, of course, must be proved."

If the taxpayer was not entitled to the salary, then, of course, he owed no income tax thereon. The government retaining the amount of tax which the individual paid must give due credit to the individual in a transferee liability for such amount. *U. S. v. Klausner, 25 Fed. 2nd 609.*

> 5. "Where transaction, which former owners of corporate stock claimed was sale of corporate assets of $100,000 and sale of defendant's stock of $100,000 was sale of corporate assets for $200,000 defendants, being liable after dissolution of corporation, for additional taxes assessed against corporation because of profit on sale of assets, were entitled to credit for over-payment they may have made on personal income taxes by reason of reporting $50,000 each as income from sale of his stock."

Also, in the case of *U. S. v. Brown, 86 Fed. 2nd, 798:*

> "Under doctrine of election, United States could not maintain bill in equity against stockholders to whom corporation's assets were distributed on dissolution, to recover unpaid income taxes which had been assessed against corporation, on ground that stockholders held assets charged with trust in favor of United States, where Commissioner had pressed to its conclusion, assessment against stockholders for their share of sum received on liquidation, less cost to their stock, on ground that entire amount of liquidating dividend constituted income to stockholders."

The Tax Court, in it's opinion, which appears in the record at pages 30 to 35, clearly distinguished the cases which are argued and cited by the Commissioner in this Court. We direct this Court's attention to the opinion of the Tax Court where it stated (R. 34), 11 T. C. 174:

". . . The determination of this Court that the petitioner is liable in equity, as transferee, can mean only that he received the transferor's assets (the excessive compensation) impressed with a trust in favor of the Government's claim against the transferor for unpaid taxes. The petitioner held the funds not for himself but for the creditors of the transferor.

"Since *Eisner* v. *Macomber*, 252 U. S. 187, the 'use and benefit' theory has been accepted as a guiding principle in determining income tax liability. It has become almost axiomatic in our tax law that individual tax liability results only from the receipt of income, in money or the equivalent, for the taxpayer's beneficial use.

"In *Commissioner* v. *Wilcox*, 327 U. S. 404, the Supreme Court said that 'a taxable gain is conditioned upon (1) the presence of a claim of right to the alleged gain and (2) *the absence of a definite, unconditional obligation to repay or return that which would otherwise constitute a gain.*' The Court further said that 'the bare receipt of property or money wholly belonging to another lacks the essential characteristics of a gain or profit within the meaning of Section 22 (a).'"

Also (R. 35):

"The instant case is distinguishable from cases like *North American Oil Consolidated* v. *Burnet*, 286 U. S. 417, dealing with the receipt of income 'under a claim of right and without restriction as to its disposition.' Here, there was a definite legal restriction of the petitioner's use of the excessive compensation which attached the moment that he received it. Such is the nature of a transferee liability.

"There is obvious inconsistency, as well as injustice, in the respondent's position in seeking to tax the petitioner on income to which he, the re-

spondent, has successfully laid claim on the ground that it was never the petitioner's income by right."

This case does not compare with the same Court's decision in *Haberkorn* v. *U. S., 173 F. 2d 587,* but is more like the decision in the case of *Knight Newspapers, Inc.* v. *C. I. R.* 143 F. 2d, p. 1007. The distinction made in those two cases by the Court is upon the same basis as the rule so often repeated by this Court, and set forth in the case of *U. S.* v. *Lewis, 340 U. S. 590.* In those cases, the Courts have held that where a taxpayer received earnings under a claim of right *and without restriction as to its disposition it is subject to tax.* One cannot, on one hand, assert that when the money was received by the taxpayer, *he held it as a trustee,* and was subject to transferee liability, and on the other hand argue that *he received it without restriction as to its disposition and thus subject it to tax.*

Having in mind particularly that as a practical matter, the taxpayer had no economic use of the money, the money having been withheld from him by the employer under the withholding tax provision, he having paid the money to the Government under the pre-payment tax plan, and he being liable under the Statute as a trustee to account to the Government for the money which he received impressed with a lien; can the Commissioner, under such circumstances, honestly assert a claim that the taxpayer *received the money without restriction?*

As was stated by the Tax Court, (R. 35):

> *"There is obvious inconsistency, as well as injustice, in the respondent's position in seeking to tax the petitioner on income to which he, the respondent, has successfully laid claim on the ground that it was never the petitioner's income by right."*

The Court of Appeals, after giving due consideration to the briefs and oral argument, rendered its decision, which is as follows:

Commissioner of Internal Revenue v. *Hall C. Smith, 194 F. 2d 536:*

> "This case came on to be heard on the record and briefs and oral argument of counsel.
>
> "And it appearing that the Tax Court of the United States, in a prior proceeding, held the respondent liable in equity as a transferee for unpaid taxes of a corporation, and that the decision of the Tax Court, 11 T. C. 174, was affirmed by this court in Charles E. Smith & Sons Co. v. Commissioner, 6 Cir., 184 F. 2d 1011, certiorari denied 340 U. S. 953, 954, 71 S. Ct. 572, 95 L. Ed. 687.
>
> "And it appearing that the receipt of the excessive salary to the extent of which the respondent was held liable as transferee constituted 'the bare receipt of property or money wholly belonging to another', Commissioner of Internal Revenue v. Wilcox, 327 U. S. 404, S. Ct. 546, 90 L. Ed., 752, and that the respondent held the funds not for himself but for the creditors of the transferor;
>
> "It is ordered that the decision of the Tax Court be, and it hereby is, affirmed."

Thereafter the Petitioner filed a Petition for rehearing and directed the Court of Appeals' attention to the decision by the Second Circuit in the case of *Commissioner* v. *Hartfield, 194 F. 2d, 662.* The attention of the Court was again directed to the decision by this Court in the case of *U. S.* v. *Lewis, 340 U. S., 590,* and *Rutkin* v. *U. S., 343 U. S. 130.*

The same Court of Appeals had theretofore decided the case of *Haberkorn* v. *U. S. 173 F. 2d, 587,* and was fully aware that its position and decision in that case had been

approved by this Court in *U. S.* v. *Lewis.* It recognized the differences and distinctions between the rule pronounced in those cases, from the rule which should be applied to the facts in the present case, and over-ruled the Petition for Rehearing.

The case of *Fleischer* v. *Commissioner, 158 F. 2d 42* is cited by Petitioner as being in conflict with the decision in the present case. A mere reading of the facts in that case indicates that there is no conflict. There is no insolvent corporation with a transferee liability involved in that case. There, there had been a payment of excessive salaries, which the officers refunded to the corporation. Somewhat similar is the factual situation in the case of *Commissioner* v. *Hartfield, 194 F. 2d, 662.* There the officers refunded excessive salaries either to the corporation, or applied it on the payment of the additional tax imposed on the corporation. In the present case as is pointed out in the brief of Commissioner, the transferee liability remains unpaid, as well as the tax obligation of the taxpayer involved herein, both items are still open by reason of this litigation. An adjustment of that year's liabilities is still to be made. *Is it not fair, just, and proper that there be a refund issued to this taxpayer, or in the adjustment of differences, that he be given a credit, and have it applied on the transferee liability?*

In this connection, we direct the Court's attention to what was said by the same Court of Appeals in the case of *U. S.* v. *Cummins Distilleries Corporation, 166, F. 2d. 17,* at page 23:

> "In Bull v. United States, 295 U. S. 247, 55 S. Ct. 695, 79 L. Ed. 1421, and Stone v. White, 301 U.S. 532, 57 S. Ct. 851, 81 L. Ed. 1265, the Supreme Court found no difficulty in preventing injustice, either to the government or to the tax-

payer, and in avoiding unjust enrichment of either, upon equitable conceptions of justice, and by the application of a historic remedy comparable to equitable recoupment (301 U. S. 539, 57 S. Ct. 854). It concluded that where money is taken through mistake its unjust retention is immoral and amounts in law to a fraud on the taxpayer's rights (295 U. S. 247, 55 S. Ct. 695), and even though the sovereign is not liable to respond to a petition of the taxpayer, the right it has given him to credit it or refund is available to him when the government proceeds against him for the collection of a tax. In Rothensies v. Electric Battery Co., 329 U. S. 296, 67 S. Ct. 271, 273, the Supreme Court wisely undertook to confine this principle so as to limit recoupment to those defenses which arise out of the transaction upon which the government's claim is based. The principle itself was not rejected. It was sought, however, more clearly than was generally supposed, to limit it in the revival of stale claims to those deriving from the same transaction, so as to preserve the salutary effect of statutes of repose, for it would be intolerable to have an income tax system under which there never would come a day of final settlement. 'A statute of limitation is an almost indispensable element of fairness as well as of practical administration of an income tax policy.'

"The decision in the Rothensies case has, however, no application to the present situation. There is here no effort to revive stale claims as a set-off against a live tax liability. The Distilleries Corporation admits that it owes 1941 and 1942 taxes in stipulated amount. The government inter alia sued for their collection. It now has the money and if the decision of the District Court and our own affirmance of it are sound it has neither legal nor moral right to keep it, unless that right arises out of the antecedent debt. That

right the appellees concede, and need not by us be questioned. Nothing in the Rothensies case, as we view it, precludes adjudication that the government apply the collection to the valid tax debt. So viewing the problem, it becomes unnecessary to explore the purpose of the Collector in crediting the enforced collection, in conflict with conventional practice, upon a disputed rather than upon a conceded tax liability, upon a later rather than upon an earlier debt, nor to consider whether such credit, which after all is but a bookkeeping entry grounded in mistake, is irrevocable."

In the case of *Floyd* v. *Scofield, 193 F. 2d, 594,* the Court stated that the dominant purpose of revenue laws is taxation of income to those who earn or otherwise create right to receive it and enjoy the benefit of it when paid. When money is received under a claim of right, but impressed with a lien so that the government can follow it, and claim it from the taxpayer, and claim it from someone to whom he has transferred it, can it be said that he has the absolute right to use it. In the case last mentioned, the Court has said that the power to dispose of income is the equivalent of ownership of it. In the present case, the taxpayer had no right to dispose of the income because it was impressed with a lien in favor of the government.

In the case of *Harrison* v. *Commissioner, 173 F. 2d, 736* the Court stated that a transferee of private property, burdened with debts of the transferor, receives the property as trustee, charged with such rebts, and is required to disgorge so much of the property as is necessary to discharge the indebtedness. This Court has repeatedly held that the transferee liability, either at law or at equity, was one that was essential for the proper administration of the tax laws.

The Commissioner, if he were successful in sustaining his stand in the present case, would lose a considerable amount of potential tax money. If taxpayers receive money at the time when they become liable as transferee, but the money is not ear-marked for the government, and the lien impressed thereon is not such which in effect, places title in the government, then in such cases, there would be no justification for the Commissioner's pursuing the transferee and the transferee's transferee.

The position of the Commissioner is not only short-sighted, but is highly unfair and unjust. At page 11 of the Petition, he asks this Court to reverse the decision which was given due consideration by the Tax Court of the United States, and by the Court of Appeals, where all the judges in the two lower courts concurred, this Court is asked to not even give it consideration and hearing, but to reverse it on the basis that the error in the decision below seems plain. The same arguments advanced in this Court in this Petition and Brief, was advanced in both of the lower courts, and to those courts it did appear plain the other way, that is that the Commissioner is wrong.

We believe that this Court will not agree with the Solicitor General, but will rather feel that the right stand is set forth and taken by the Circuit Court in the case of *Stockstrom v. Commissioner, 190 F. 2d, at 289, when it said:*

> "It has been well said that the government should always be a gentleman. Taxpayers expect, and are entitled to receive, ordinary fair play from tax officials."

We respectfully submit that upon due consideration, this Court will find that the decision of the Tax Court, and the decision of the Court of Appeals affirming it, were in all respects correct. The Tax Court, and the affirmance of

its decision by the Court of Appeals, have been more than fair to the Commissioner in their decisions. The taxpayer had actually paid $46,000.00 in taxes, on the $57,000.00 excessive salary, which was impressed with a lien and trust in favor of the government. It is only by reason of the operation of the Current Tax Payment Act of 1943 that the taxpayer can only recover the amount of the refund, or credit amounting to $33,000.00. This decision was rendered with the full eye towards fairness in favor of the government, and the decision should be that the Petition for Certiorari is denied.

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July 31, 1952.

PETITION FOR REHEAR-ING

No. 138

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United States Supreme Court

October Term, 1952

COMMISSIONER OF INTERNAL REVENUE
Petitioner,

vs.

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HALL C. SMITH,

Respondent.

PETITION FOR REHEARING

The Court rendered its opinion and decision on April 6, 1952. Within 15 days thereof, the respondent, Hall C. Smith files this petition for rehearing pursuant to the provisions of Rule 33 of this Court; Counsel signing the Petition for Rehearing, certifies that this is not being filed for the purpose of delay, but is presented in good faith and founded upon the sincere belief of counsel that the Court has been led astray by the contentions and arguments in the Brief of Petitioner which actually are not in issue in this case.

Petitioner's entire argument, sustained by the Court's opinion, is based upon the well established rule that income tax accounting is to be upon an annual basis and that any adjustments occurring in subsequent year transactions should not be reflected in prior year tax adjustments. The instant case does not present this question.

Section 272 of the Internal Revenue Code, Title 26, provides that when an assessment is made by the Com-

missioner the taxpayer may file a petition within ninety days with the Tax Court of the United States. The Tax Court of the United States is given jurisdiction to *redetermine the tax liability of the taxpayer for that particular year.* 272 (G) of the Internal Revenue Code limits the jurisdiction of the Tax Court to the particular year and merely permits the Tax Court to look into prior years, but in so doing "shall have no jurisdiction to determine whether or not the tax for any other taxable year has been overpaid or underpaid."

Pursuant to this provision of the Internal Revenue Code, the petitioner, having made an assessment against respondent (transcript of record, page 7 and page 16) informed the taxpayer as follows:

> **"If a petition to the Tax Court of the United States is filed against the deficiency proposed herein, the issue set forth in your claim for refund should be made a part of the petition, to be considered by the tax court in any redetermination of your tax liability."**

The jurisdiction of the Tax Court to consider and redetermine the liability of the respondent for the year 1943 was not questioned by either the Commissioner or the taxpayer.

The Tax Court was confronted with the situation where the respondent had received $87,000 as salary during the year 1943 and through withholding and prepayment tax, he paid some $60,000 thereon in income taxes. *The $60,000 was received and held by the Commissioner, and in effect, never was in the possession of the taxpayer, so that he could have economic use or benefit thereof.* Thereafter, in a proceeding held in the Tax Court, which is contained in the record in this Court (in Case No. 545 October term

1950,) the respondent was held liable as transferee for $57,000 of the $87,000 salary. The Commissioner asserted a transferee liability against the respondent for the $57,000 and as a net result, the respondent would have been faced with paying $117,000 as income tax and transferee liability on $87,000 of salary. This meant that the Commissioner was seeking to recover from respondent in income tax and transferee liability approximately 140% of the amount he received. *This is in no way a tax on income when it requires you to pay $1.40 on every $1.00.*

Having in mind that the Tax Court was redetermining the tax liability of the Petitioner for the year 1943, and that it had theretofore held the Petitioner liable as transferee for $57,000 of the $87,000, the Court found (transcript of record, page 24):

> "Tax Court's determination in the transferee proceeding is not attacked in this proceeding. The Petitioner's only contention here, is that since it has been determined by this Court that he is liable in equity as a transferee for the unpaid taxes of the full amount of excessive compensation distributed to him in the taxable year, such excessive salary may not be included in his taxable income."

ARGUMENT

This Court, in its desire to sustain the sanctity of the rule of "annual accounting," is by its decision in this case, causing a grave injustice. Ever since the decision by Chief Justice Marshall in the case of *U. S.* v. *Nourse*, 34 U. S. 8, this Court has time and again repeated that no decision of the Court should be permitted to cause an injustice. In the case of *Bull* v. *U. S.*, 295 U. S. 247, this Court would not permit the United States to hold a collection of income tax and estate tax on the same funds and stated:

"In a proceeding for the collection of estate tax, the United States through a palpable mistake, took more than it was entitled to. *Retention of the money was against morality and conscience.*"

The Court in its opinion permitted a recovery even though the Statute of Limitation had run against the taxpayer. Has "morality and conscience" so far advanced that the government may now take $117,000.00 in income and transferee tax on $87,000 of income?

In the case of *Commissioner* v. *Gooch Milling and Elevator Company,* this Court had under consideration, the provisions of Section 272 of the Internal Revenue Code, and at page 420, this Court found that the Tax Court had jurisdiction to make a redetermination of the amount of the deficiency or overpayment for the particular tax year, as to which the Commissioner determines a deficiency, and as to which the taxpayer seeks a review of the deficiency assessment.

In the case of *Fischer* v. *Commissioner,* 149 Fed. 2d, 540, Justice Minton, while a member of the Circuit Court of Appeals 7th Circuit wrote the opinion indicating that 26 U.S.C.A. Internal Revenue Code Section 272 gives the Tax Court jurisdiction to redetermine the amount of tax which had been assessed against a taxpayer for a particular year.

In the case of *Rutkin* v. *United States,* Justice Black, Reed, Frankfurter and Douglas dissented from the opinion and decision of this Court, whereby under the "claim of right" doctrine, income tax was imposed on Rutkin for money which he obtained by extortion.

In the case of *Arrowsmith* v. *Commissioner,* 344 U.S. 6, 97 L. ed. 19. Justice Douglas, Jackson and Frankfurter dissented from the decision of the Court where-

by this Court apparently did violence to the annual accounting period doctrine by looking back into an earlier year, so as to charge a taxpayer with income tax rates rather than capital gains rates on a deduction. In the case of *Commissioner* v. *Wilcox,* 327 U. S. 404, this Court held that a thief is not subject to income tax on the money he steals. The Court based its findings on the doctrine that the "claim of right" theory is not applicable because of the restrictions that exists on the gains which the thief has. It seems a rather harsh definition and conception of justice to say that the thief who steals money may keep it without payment of tax because his claim of right is restricted; but the Court would hold in this case, that a man is subject to tax on money which the Government says *he should not have had,* and successfully took it away from him!

Has the Dobson Rule (*Dobson* v. *Commissioner* 320, U.S. 489) been so discredited that no weight or consideration is to be given to the judgment of the Tax Court that had the opportunity of seeing the witnesses, hearing their testimony and considering questions of tax law which are normally handled by them from day to day. Does the spirit of the *Dobson Rule* in no way commend the respect of this Court for the judgment in this case made by the United States Court of Appeals for the Sixth Circuit; that considered the decision in the *Healy* case of the United States Court of Appeals of the Second Circuit and distinguished the two?

The respondent in this case feels that great injustice is being done to him by reason of the coupling of his case with the *Healy* case. The facts in the *Healy* case are such that they do not require the Court to make a close scrutiny as to whether these various rules and principles should or

should not be applied. *The application of any rule to a case which results in the Government taking $1.40 for $1.00 income shows on its face that such rules do not apply.*

This case presents a situation where an individual worked during a war year for a salary fixed by his corporation at $87,000. He worked with such great and extreme effort, that at the end, he became a physical wreck and has not been able to work ever since. The imposition of a tax liability and transferee liability of a total of $117,000.00 on a salary fixed at $87,000.00 results in a financial calamity to this individual. Not only has he lost his health, but has lost every bit of property as a result of this decision. (Record in Case 545, October, 1950)

During the oral argument of this case, the Court asked the counsel for Petitioner whether or not its stand being taken in this case was one that it applied uniformly. The answer was in the affirmative, but nothing was presented to indicate that such is a fact. A search of the authorities and any information that is available to taxpayers fails to disclose that there ever has been such a policy on the part of the Commissioner. The opinion of this Court seems to imply the existence of such a practice and refers to *G. C. M.* 16730 *XV*-1 *Cum. Bull.* 179 (1936). An examination of the reference indicates that is merely an opinion based on the "claim of right" doctrine, and in no way indicates that the Government's position is such that in cases like the present one they had followed a uniform policy.

As a matter of fact, all indications are that such a policy has not been followed. Congressional enactment of Section 272, giving the Tax Court jurisdiction to make a redetermination; the quotation made at the beginning of our Brief from *the Revenue Agent's letter advising the taxpayer to set up his claim in the Tax Court*, clearly indicates that

the Government's position has been that the Tax Court is to make a redetermination of all factors known at that time when it considers the untimate tax liability of a taxpayer for the year in question.

When this matter was presented by oral argument last December, more than a majority of the members of the Court were made aware of the fact that the "annual accounting period" and the "Claim of Right Doctrine" had no application to this case. We pointed out in oral argument that *this was an action opened by the Commissioner and not by the taxpayer. The year 1943 was opened when the Commissioner made an additional assessment and advised the taxpayer to seek a redetermination in Tax Court, not only of the proposed assessment, but also of his claim for refund based upon the transferee liability.* The Tax Court and the Court of Appeals sustained the taxpayer's claim on the theory that the year was opened and could be readjusted and that by reason of their prior judgment, that the Commissioner was bound, and that the taxpayer should not be treated as a transferee liablor in one case, and as a recipient of income in another.

Four months elapsed between the oral argument and the rendering of a decision by the Court. The decision clearly indicates that the Court lost sight of the contentions advanced by respondent that he did not seek to open a closed year, but merely followed the direction of the Commissioner and sought a redetermination in line with the holding of the Tax Court and the Court of Appeals that $57,000.00 of what he thought was salary was actually money belonging to the Government.

If Congress sought to legislate, whereby an income tax of 140% was imposed, this Court would strike it down as being contrary to the 16th Amendment of the Federal

Constitution. The decision of this Court accomplishes just that end.

President Eisenhower appears to be duly alarmed by the existing duplication in taxes brought about by the various Federal and State Governments imposing tax on the same subject. To end such duplication, he has appointed a commission to investigate it. How more grave is the holding and decision of this Court which permits duplication to an extent where 140% is taken under the guise of an income tax law.

We respestfully submit that the decision of this Court does violence to every principle of justice. In order to safeguard an established rule of procedure involving the "annual accounting period," the Court applies that rule to this case in violation of the express enactment of Congress as contained in Section 272 of the Internal Revenue Code, which gives the Tax Court jurisdiction to redetermine a year. *This Court cannot in the face of this record, justify the finding that the year was sought to be reopened by the taxpayer.* The record shows that the Commissioner reopened the year at a time after the transferee liability had been imposed upon the taxpayer at the Commissioner's instance. Under such circumstances, justice demands that the decision of this Court be vacated and a rehearing granted.

Respectfully submitted,
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April 16, ~~1953.~~